

September 5, 2014

Matthew C. Maclear  
Aqua Terra Aeris Law Group  
7425 Fairmount Ave.  
El Cerrito, CA 94530

Re: Your Request for Advice  
**Our File No. A-14-154**

Dear Mr. Maclear:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter should not be construed as assistance on any conduct that may have already taken place (Regulation 18329(c)(4)(A)), and is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Political Reform Act, such as the post-employment provisions of Public Contract Code Section 10411.

### **QUESTION**

What restrictions or limitations will be placed on your current employment activities as a result of your former employment with the California Environmental Protection Agency (“CalEPA”)?

### **CONCLUSION**

The restrictions that exist based on your former position with the CalEPA include the permanent ban on switching sides and the one-year ban, both of which are explained in detail below.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

You began your state service on January 30, 2012, as an appointee of Governor Brown to the position of Assistant General Counsel of Enforcement for CalEPA. In that position, you managed a team of trainers who traveled throughout the state training state and local environmental agencies in best management practices related to inspections and evidence collection. In addition, you managed the Single Complaint Tracking System in which the public submits environmental complaints for investigation. You were also involved in the document review process for Public Records Act requests as well as the coordination of two investigations by various state agencies and local prosecutors. You permanently separated from state service on April 9, 2014.

On April 10, 2014, you started your own environmental law firm. You represent, among others, nonprofits, citizen and environmental justice groups in citizen-suits and representative actions against polluters. A small part of your practice includes representing companies that want to get pollution prevention and waste reducing products to market by ensuring they do not make false or misleading claims in advertising. In addition, you are pursuing representation of a company that has utilized nanotechnology in the development of a product that gives real-time analysis of samples taken in the field by enforcement agencies and other private interests.

Your advice request focuses mainly on whether you may contact the boards, departments and offices under CalEPA with regard to your representation of pollution prevention/waste reducing technology and real-time sampling analysis technology. In particular, you would like to seek a legal opinion from those boards or departments concerning the effectiveness, reliability and accuracy of the technologies your current and prospective clients have developed. You state that in doing so, you would not be seeking to influence any issuance, amendment, award or revocation of a permit, license, grant or contract or the sales or purchase of any goods. Instead, you would ask for formal legal opinions from the Department of Toxic Substances and the State Water Resources Control Board as to whether the technologies actually do what they purport to do.

## ANALYSIS

### **Post-Governmental Employment Provisions**

#### *One-Year Ban*

#### **A. General Application of the One-Year Ban**

Section 87406 prohibits specified public officials, specifically including those who filed a Statement of Economic Interests (Form 700), from acting as agents or attorneys or otherwise representing, for compensation, “any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof,” for one year after the official left the agency’s

employment “*if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.*” (Emphasis added.)<sup>2</sup>

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.”

We assume that in your position as Assistant General Counsel of Enforcement at CalEPA you were required to file a Form 700 “Statement of Economic Interests,” and you are therefore subject to the Act’s one-year ban.

Regulation 18746.1(b) outlines the circumstances when the prohibitions of the one-year ban will apply. Under this regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

“(1) The official has left his or her state office or employment, which means he or she has either permanently left that state agency or is on a leave of absence.

“(2) The appearance or communication is made within 12 months after leaving state office or employment.

“(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

“(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code Regs., Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

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<sup>2</sup> The prohibitions of Section 87406 do not apply to appearances for which you do not receive compensation.

“(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

“(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings . . .

“(6) The appearance or communication is made before any officer or employee of any of the following:

“(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment . . .

“(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A) . . .

“(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the 12 months before leaving state office or employment.”

## **B. Communications Covered by the One-Year Ban**

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) As stated above, a communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.”<sup>3</sup> (Regulation 18746.2(a).)

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<sup>3</sup> “Legislative action” is defined at Section 82037 to mean “the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill.” Section 82002(a) provides that “‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.”

Certain communications are not restricted under the one-year ban. A communication is not subject to the one-year ban when the former official:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- “(2) Attends a general informational meeting, seminar, or similar event;
- “(3) Requests information concerning any matter of public record; or
- “(4) Communicates with the press.” (Regulation 18746.2(b)(1)-(4).)

Whether a particular appearance or writing is for the purpose of influencing administrative or legislative action or a specific proceeding (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee’s attendance is not for the purpose of influencing the agency’s action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, it may more readily be inferred that the former employee’s presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)

You have inquired about seeking information from certain boards or departments under CalEPA concerning the effectiveness, reliability and accuracy of the technologies your current and prospective clients have developed. Specifically, you would request legal opinions<sup>4</sup> as to whether the technologies actually do what they purport to do. The one-year ban would appear to apply in this situation as you would be communicating with boards and departments subject to the direction and control of CalEPA about matters that could arguably be characterized as “administrative action.”

However, as described above, the one-year ban would not prohibit such communications so long as you were not attempting to influence the boards or departments. In this regard, to avoid any appearance of impropriety, your requests should always be in writing and not supplemented verbally by you to any staff or board members regarding your view of the facts, the applicable law, or the correct outcome. (See, e.g., *Ordos* Advice Letter, No. A-95-052 [providing guidelines for seeking requests for written advice from the Fair Political Practices Commission in a situation where the one-year ban applies].) This is consistent with past advice where we have advised that an informational meeting with an official’s former public employer

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<sup>4</sup> We note that there is a specific exemption for “[a] proceeding involving the issuance of a legal opinion.” (Regulation 18202(a)(7).) Such proceedings are deemed not to be “quasi-legislative action” and, thus, under Section 82002(a), are not “administrative action.” This exception was found not to apply to written advice issued by the Fair Political Practices Commission because “the formulation of written advice is not a “proceeding” and is not conducted in a formal, recorded manner.” (*Ordos* Advice Letter, No. A-95-052.) For the same reasons, we do not find that the type of requests for information you intend to make falls within the purview of the “legal opinion” exception under Regulation 18202(a)(7).

to determine the agency's viewpoint or general position on a subject is not, in itself, influencing a legislative or administrative action. (*Bagatelos* Advice Letter, No. I-91-202.)<sup>5</sup>

### *Permanent Ban*

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state agency employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . ." (Section 87400(c).)

An official is considered to have "participated" in a proceeding if the official took part "personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee . . ." (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).)

As a former CalEPA employee, you are former a state employee subject to the permanent ban. Generally, as the Assistant Chief Counsel of Enforcement at CalEPA, you are deemed to have previously participated in any enforcement proceedings for purposes of the Act's permanent ban where accusations were issued in your name, you received any correspondence, or you had any involvement whatsoever in a particular matter. In such cases, you are permanently disqualified from participating in the matter after leaving state service. You have not provided any facts with respect to a particular case; therefore, we cannot make that determination.

The permanent ban applies throughout the duration of a proceeding in which the official participated. It does not, however, prohibit the official from representing a client in any new proceeding, even though the person may have been a party to a previous proceeding in which the official participated. (*Ferber* Advice Letter, No. I-99-104.)

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<sup>5</sup> Certain other informal requests for information may likewise not be considered influencing. For example, an employee may request information from his or her former agency concerning anything that is a matter of public record, such as existing laws, regulations, or policies. (Regulation 18746.2(b)(3); *Tobias* Advice Letter, No. I-96-089.)

If you need additional assistance regarding the permanent ban and any proceeding in which you previously participated as a CalEPA employee, please submit a separate advice request providing the details of the particular proceeding.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Jack Woodside  
Senior Counsel, Legal Division

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